

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STEPHEN P.,

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2010041289

DECISION

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 28, 2011, in Los Angeles.

Stephen P. (claimant) was represented by his mother, Roni P. (claimant's mother or mother).¹

Johanna Arias-Bhatia, Fair Hearing Manager, represented South Central Los Angeles Regional Center (SCLARC or Service Agency).

Oral and documentary evidence was received and the record was left open to allow claimant's mother to submit medical documentation of her illness, Chronic Obstructive Pulmonary Disease (COPD). On March 28, 2011, claimant's mother submitted documentation related to her diagnosis of COPD which was marked as claimant's Exhibit C. On April 7, 2011, Service Agency submitted its response to claimant's Exhibit C and which was marked as Exhibit 11. On April 21, 2011, claimant's mother submitted a reply to Service Agency's Exhibit 11, which was marked as claimant's Exhibit D. Claimant's Exhibit C and D, and Service Agency's Exhibit 11 were admitted into evidence, Exhibit 11

¹ Initials and family titles are used to protect the privacy of claimant and his family.

over the objection of claimant. The record was closed and the matter was submitted for decision on April 21, 2011.²

ISSUE

May Service Agency reduce claimant's in-home respite hours from 40 hours per month to 30 hours per month and is claimant entitled to compensatory respite hours?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is an 18 year-old boy who lives at home with his mother. He is the adopted son of mother and has three other siblings who are all in foster placement and have little to no contact with him. Claimant is diagnosed with Autism, Moderate Mental Retardation, and Cognitive Disorder NOS. He is relatively independent with respect to his self-help skills. Claimant is able to feed and dress himself, is independent in toileting, and can perform personal care functions such as bathing and combing his hair. He makes his bed and helps out around the house performing minor chores such as taking out the trash and assisting with the laundry. Claimant, however, has destructive and aggressive social behavior tendencies, including periodic tantrums, hitting, kicking, biting and scratching, and at times self-injurious behaviors. His maladaptive behaviors have the potential of harming others, and at times have resulted in injury to others. The Service Agency has offered behavior intervention services to claimant's mother but she declined these services stating that past intervention services had not been beneficial.

2. On January 14, 2010, Service Agency sent claimant's mother a Notice of Proposed Action (NOPA) advising of its determination that claimant's in-home respite hours would be reduced to 30 hours per month, pursuant to Welfare and Institution Code section 4686.5, subdivision (a).

3. On or about March 27, 2010, claimant's mother filed a Fair Hearing Request (FHR) appealing the Service Agency's decision to reduce claimant's in-home respite hours from 40 hours to 30 hours per month, the statutory monthly maximum under Section 4686.5, subdivision (a).³ At hearing, claimant's mother stated she was not appealing the reduction of

² Although the record was scheduled to be closed on April 8, 2011, after receipt of Service Agency's response to claimant's mother's submission of medical evidence documenting the diagnosis of COPD, claimant's mother's reply is admitted and will be considered.

³ Service Agency also sent a NOPA letter to claimant on March 23, 2010, notifying claimant's mother that specified camping services would be discontinued pursuant to

in-home respite hours, although the March 27, 2010 FHR stated that she was appealing “services denied” and she requested “reinstatement of respite hours.” She also argued at hearing that the in-home respite hours should not be reduced due to her medical condition. Thus, the reduction of in-home respite hours is at issue in this proceeding. Claimant’s mother also argued that she should be compensated for ten hours per month of in-home respite hours from September 2009 to present because the Service Agency terminated claimant’s camp services after the summer of 2009, without conducting an evaluation of claimant’s service needs as specified in the settlement agreement. Claimant’s FHR was unclear regarding this contention, but clarifying discussions at hearing established that compensatory services for in-home respite was being sought by claimant’s mother.

4. Claimant currently receives 40 hours per month of in-home respite services from Service Agency through Accredited Nursing Care in Encino, California. The 40 hours per month of in-home respite hours are based upon the October 2008 settlement agreement and is aid-paid pending the final decision in this matter. Claimant also receives three hours per week of gymnastics through Los Angeles School of Gymnastics and transportation for his gymnastics program. He receives 15½ hours per week, 50 weeks per year, of behavior intervention services through the Los Angeles Unified School District (LAUSD), provided by Verdugo Hills Autism Project, 60 minutes of occupational therapy per month, 127.5 minutes per month of speech and language therapy, and 60 minutes per week, two 30 minute sessions, of Adapted Physical Education (APE), all from LAUSD.

5. As background leading up to the October 2008 settlement agreement, on April 16, 2008, Service Agency notified claimant that it intended to terminate 26 hours per month of “temporary” in-home respite that had been provided by Service Agency until claimant’s mother was able to access generic resources and services to replace this “temporary” service. The 26 hours of “temporary” in-home respite was provided in addition to 24 hours per month of in-home respite Service Agency provided pursuant to claimant’s Individual Program Plan’s (IPP) documented needs. Claimant was receiving 50 hours of in-home respite hours per month prior to the April 16, 2008 NOPA.

6. On June 7, 2008, claimant’s mother filed a FHR to appeal Service Agency’s termination of the 26 hours of “temporary” in-home respite hours. Pursuant to a settlement agreement between the parties dated October 13, 2008, Service Agency agreed to fund: (1) 40 hours per month of in-home respite services; (2) one week of overnight camp at Camp Paivika for the 2008/2009 fiscal year; and (3) one week of gymnastic camp at LA Gymnastics for the 2008/2009 fiscal year.⁴ The agreement also provided that during the

Welfare and Institution Code section 4648.5, subdivision (a). However, Claimant’s mother did not file a FHR to appeal the termination of the camping services.

⁴ Service Agency provided the one week of Camp Paivika and one week of gymnastics camp to claimant for two years, summer 2008 and summer 2009. These services were discontinued after summer 2009.

month prior to the end of fiscal year 2008/2009, Service Agency would evaluate the necessity for the continuation of services for the upcoming fiscal year 2009/2010. On October 14, 2008, claimant's mother and Service Agency signed a Notice of Resolution based upon the settlement agreement and the claimant's Fair Hearing Request was withdrawn.⁵

7. Claimant's mother seeks compensatory services for ten hours per month of in-home respite from September 2009 to present based upon Service Agency's failure to return the in-home respite hours to 50 hours per month after the overnight camp and gymnastics camp were discontinued for 2010/2011 fiscal year. Mother claims Service Agency failed to evaluate claimant's continued need for the level of services provided in the settlement agreement as agreed to in the settlement agreement.

8. Claimant's mother has been diagnosed with COPD. She developed this disease as a result of a history of smoking and tobacco use. As a result of this illness, mother suffers from emphysema with acute bronchitis. She has been placed on a regimen of medications to treat the bronchitis and was advised by her physician to discontinue smoking. Although medical records submitted by claimant's mother confirmed her diagnosis of COPD, there was no medical opinion or records to confirm the extent of her physical limitations or how her "acute bronchitis" related to the need for additional in-home respite hours. Although mother's medical evidence provided a generic description of the effects of COPD, there was no specific medical evidence or opinion specifying how the disease had affected or impacted claimant's mother physical capacities.

LEGAL CONCLUSIONS

1. Cause exists to deny claimant's appeal of Service Agency's decision to reduce in-home respite services to 30 hours per month, by reason of Factual Findings 1 through 8, and Legal Conclusions 1, and 3 through 5.

2. Claimant also failed to establish that he is entitled to ten hours per month of compensatory in-home respite services, by reason of Factual Findings 2 through 7, and Legal Conclusions 2, 3 and 6.

3. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, Service Agency bears the burden of proving, by a preponderance of the evidence, that in-home respite services reduced are appropriate, and claimant has burden

⁵ The 2008 FHR, settlement agreement, and NOPA are not at issue in this case. These facts are only pertinent for background and to ultimately address claimant mother's contention that she is entitled to compensatory hours of in-home respite services.

of showing that an exemption applies. Claimant also has the burden of proving by a preponderance that he is entitled to compensatory in-home respite services. (*See* Evid. Code, § 115.)

4. Welfare and Institutions Code section 4686.5, subdivision (a) provides that:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3)(A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer.

(B) For purposes of this section, 'family member' means an individual who:

(i) Has a consumer residing with him or her.

(ii) Is responsible for the 24-hour care and supervision of the consumer.

(iii) Is not a licensed or certified residential care facility or foster family home receiving funds from any public agency or regional center for the care and supervision provided. Notwithstanding this provision, a relative who receives foster care funds shall not be precluded from receiving respite.

5. Effective July 1, 2009, the California Legislature amended the Lanterman Developmental Disabilities Act services to set statutory maximums of 90 hours per quarter or 30 hours per month for in-home respite services unless claimant is able to demonstrate that he qualifies for an exemption. To qualify for an exemption claimant must show either that the intensity of claimant's care and supervision is such that additional respite hours are needed to keep claimant in the family home, or that an extraordinary event impacts claimant's mother's ability to care for him.

The evidence did not establish that claimant's care and supervision needs required additional respite hours to maintain him in the family home. Claimant's self-help skills were good to adequate and even though there are periodic aggressive and destructive behaviors, it does not appear such behaviors were so intense as to warrant consideration of removal from the home but for increased respite services. In fact, claimant's mother has declined additional behavior intervention services offered by Service Agency to address the maladaptive behaviors.

Claimant's mother essentially argues that the exemption should apply because she suffers from COPD, a medical condition which is physically debilitating and causes acute bronchitis and emphysema. However, the evidence failed to establish this illness is an "extraordinary" event that precludes mother from caring for claimant with the reduced level of in-home respite being offered by Service Agency. To be sure, mother's COPD has limited her physical capacity by virtue of the restrictions on her breathing caused by the acute bronchitis and emphysema. But the medical evidence provided by mother merely showed she is being treated for the disease without specifying how severe and to what stage of debilitation, if at all, claimant's mother is experiencing. There simply is insufficient evidence on this record to corroborate mother's testimony that the illness substantially hinders her ability to care for claimant.

6. Finally, claimant's mother contends she is entitled to ten hours per month of compensatory in-home respite hours from September 2009 to present because the Service Agency discontinued the overnight and gym camps after summer 2009 and did not restore the in-home respite at the pre-settlement agreement level of 50 hours per month. Mother's argument fails for two reasons: (1) the settlement agreement specifically states that the services provided in the agreement were applicable through the 2008/2009 fiscal year, meaning they terminated effective June 30, 2009; and (2) on July 1, 2009, the California Legislature amended the Lanterman Act to suspend funding for, among other services, camping and social recreation activities, absent an exemption, Welfare & Institutions Code section 4648.5, subdivision (a), and to reduce in-home respite hours to a statutory maximum of 90 hours per quarter, absent an exemption, Section 4686.5, subdivision (a).

Based upon claimant's appeal of the reduction of the in-home respite hours from 40 hours to 30 hours per month, Service Agency continued to provide 40 hours per month of in-home respite hours to claimant pending a fair hearing and decision in this matter. The 40 hours of in-home respite, which is subject to the aid paid pending provisions of the Lanterman Act, is the relevant level of respite services pursuant to the NOR signed by

claimant on October 14, 2008. Claimant's mother also argues that Service Agency failed to conduct an evaluation to ascertain claimant's continued need for in-respite services and therefore the pre-settlement agreement level of 50 hours per month must be restored. There is no basis for this assertion by claimant given the October 2008 settlement agreement and subsequent NOR. Additionally, any in-home respite hours after July 1, 2009, would be subject to the Lanterman Act amendments and the statutory maximum, barring a showing that claimant is entitled to an exemption. As stated above, claimant failed to establish that he is entitled to any exemption. Accordingly, claimant has not sustained his burden to show reimbursement of in-home respite hours is appropriate.

ORDER

Claimant Stephen P.'s appeal is denied; South Central Los Angeles Regional Center's decision reducing claimant's in-home respite hours to 30 hours per month is affirmed.

DATE: April 26, 2011

MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.